

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOSEPH L NICKOLS,  
Plaintiff,  
v.  
STEVE MANSFIELD, JIM PEA,  
JACK HASKINS, JULIE WEST,  
TERRY WILSON,  
Defendant.

CASE NO. C13-5942 BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR:

SEPTEMBER 26, 2014

The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States Magistrate Judge J. Richard Creature pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR1, MJR3 and MJR4.

Currently before the Court is defendants' motion for summary judgment (Dkt. 43). All defendants except Terry Wilson join in this motion. The Court was not able to serve defendant Wilson. The Court requested that plaintiff provide another address so that the Court could attempt to perfect service on this defendant (Dkt. 34). Plaintiff did not provide any further

1 information and defendant Wilson has not been served. It has been well over 120 days since  
2 plaintiff commenced this action.

3 The Court recommends granting defendants' motion because plaintiff failed to exhaust  
4 his reasonably available administrative remedies and he cannot now go back and exhaust those  
5 remedies. The Court does not reach the merits of any issue. The Court recommends dismissal of  
6 the claims against Terry Wilson without prejudice for failure to perfect service.

7 **OVERVIEW**

8 Plaintiff alleges a failure to protect him from an attack by another inmate at the Lewis  
9 County Jail (Dkt. 4, p. 3). Plaintiff also alleges that after the assault, jail personnel retaliated  
10 against him and that he did not always receive a Muslim diet (Dkt. 4, p. 3). Plaintiff's other  
11 allegations are for lack of proper medical treatment for injuries he received in the assault and for  
12 failure to provide proper medications for his mental health (Dkt. 4, p. 3).

13 The named defendants are Lewis County Sheriff Steve Mansfield, Lieutenant Jim Pea,  
14 Sergeant Jack Haskins, and Correctional Officer Julie West. The other named defendant, Doctor  
15 Terry Wilson, was never served and is no longer a proper party to this action. *See Fed. R. Civ. P.*  
16 4(m) (plaintiff had 120 days from commencement of the action to perfect service). This action  
17 was commenced October 29, 2013, when the Court granted plaintiff's motion to proceed in  
18 forma pauperis and the Clerk's Office filed the complaint (Dkt. 4).

19 The Lewis County Jail has a formal grievance process and the policy is attached as an  
20 exhibit to the declaration of Kevin Hanson (Dkt. 45-1 pp. 31-32). An inmate has 24 hours after  
21 an incident to file a grievance (*id.*). Further, the inmate has 72 hours after receiving a grievance  
22 response to file an appeal (*id.*).

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1 FACTS  
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3 On April 23, 3013, Officer Julie West allowed plaintiff to exit his cell for his “hour out.”  
4 (Dkt. 46 pp. 1-2 (declaration of Julie West)). The jail housed plaintiff in an Intensive  
5 Management Unit and he was allowed out of his cell only for meals and one hour of recreation  
6 each day (*id.*). Inmates on this status are let out one at a time for recreation and are supposed to  
7 be by themselves (Dkt. 46, pp. 1-2 ¶ 3 (declaration of Julie West)). Unbeknownst to officer  
8 West, inmate Domenic Combs was hiding in the shower. When Officer West let plaintiff out,  
9 inmate Combs and plaintiff fought with each other. Defendant West states in her report that as  
10 the door opened she heard other inmates in the unit yelling. When she looked into the unit she  
11 saw an inmate with no shirt in the dayroom area. She called for backup and other officers  
arrived and separated the inmates (Dkt. 46, attached report).

12 Plaintiff broke his nose during the fight, but he denied injury and refused medical  
13 treatment on the day of the incident (Dkt. 45-1 (Declaration of Kevin Hanson, Exhibit 5)). The  
14 same exhibit shows plaintiff complaining of a broken nose the next day and medical staff  
15 ordered X-rays. The X-ray disclosed a “nondisplaced fracture of the right side of the nasal  
16 bones.” (Dkt. 45-1, Exhibit 6).

17 Plaintiff alleges that since the fight he has been retaliated against by not getting proper  
18 meals. That his nose was not fixed properly, and that he has not received proper medication for  
19 his mental health issues (Dkt. 4).

20 Defendants move for summary judgment arguing that plaintiff failed to exhaust  
21 administrative remedies. While defendants raise other arguments, the Ninth Circuit has stated  
22 that failure to exhaust administrative remedies should be addressed at the outset before reaching  
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1 the merits. *Albino v. Bacca*, 747 F.3d 1162, 1170-71 (9th Cir. 2014). Plaintiff did not file a  
 2 response to defendants' motion.

3 STANDARD OF REVIEW

4 In federal court, summary judgment is required pursuant to Fed. R. Civ. P. 56(a) if the  
 5 evidence, viewed in the light most favorable to the nonmoving party, shows that there is no  
 6 genuine issue as to any material fact. *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th  
 7 Cir.1997). Once a party has moved for summary judgment Fed. R. Civ. P. 56(c) requires the  
 8 nonmoving party to go beyond the pleadings and identify facts that show that a genuine issue for  
 9 trial exists. *Id.* at 323-24; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

10 DISCUSSION

11 1. Administrative remedies.

12 The Prison Litigation Reform Act ("PLRA") requires plaintiff to exhaust whatever  
 13 administrative remedies are available to him prior to filing a complaint in federal court. The  
 14 relevant portion of the act states:

15 No action shall be brought with respect to prison conditions under section 1983 of  
 16 this title, or any other Federal law, by a prisoner confined in any jail, prison, or other  
 17 correctional facility until such administrative remedies as are available are  
 18 exhausted.

19 42 U.S.C. § 1997e(a).

20 Here, plaintiff filed this action while incarcerated and the Act applies to him. *See* 42  
 21 U.S.C. §1997e(h). The statute defines prisoner to include any person confined in a facility for a  
 22 violation of criminal laws, including persons accused of or convicted of crimes.

23 The Ninth Circuit has set forth the frame work for considering a motion to dismiss for  
 24 failure to state a claim. Failure to exhaust under the PLRA is "an affirmative defense the  
 defendant must plead and prove." *Albino v. Bacca*, 747 F.3d 1162, 1166 (9th Cir. 2014)' (citing

1 *Jones v. Bock*, 549 U.S. 199, 204, 216, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007)). Defendants  
 2 must show that there “was an available administrative remedy, and that the prisoner did not  
 3 exhaust that available remedy.” *Albino* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d 767,  
 4 778 n. 5 (9th Cir.1996)). A motion for failure to exhaust should be decided before reaching the  
 5 merits of any claim and if feasible at the outset of litigation. *Albino* at 1170-1171.

6       Here, defendants meet their burden of proof by providing documents showing that  
 7 plaintiff used the grievance system and was familiar enough with the system to file grievances  
 8 and appeals (Dkt. 45-1 pp. 34-47). Plaintiff failed to appeal any grievance regarding the issues in  
 9 this complaint. Plaintiff only filed appeals twice (Dkt. 45-1, p. 46). One of plaintiff’s appeals  
 10 addresses the sending and receiving of mail (Dkt. 45-1, pp. 46-47, Exhibit 9). Plaintiff’s second  
 11 appeal addressed the issue of searching legal mail (*id.*). Thus, none of the issues in this complaint  
 12 have been properly exhausted.

13       Once defendants have met their burden, plaintiff must come forward with evidence  
 14 showing that the administrative remedy was not available to him. *Albino* at 1172. Plaintiff did  
 15 not respond to the motion for summary judgment. Accordingly, the Court recommends  
 16 dismissal of this action for failure to exhaust administrative remedies without reaching the merits  
 17 of any claim.

18       Having recommended dismissal of the action, the next issue is whether the dismissal  
 19 should be with or without prejudice. Prior to 2014 the dismissal would have been without  
 20 prejudice. *Wyatt v. Terhune*, 305 F.3d 1033, 1045 (9th Cir. 2003). The Ninth Circuit overruled  
 21 *Wyatt* and held that a motion to dismiss for failure to exhaust administrative remedies should be  
 22 considered under the summary judgment framework. *Albino v. Bacca*, 747 F.3d 1162, 1166 (9th  
 23 Cir. 2014). This means that instead of considering the issue as a matter being held in abatement  
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1 (Wyatt at 1045), the Court considers the dismissal on the merits pursuant to Fed. R. Civ. P. 56.  
2 *Albino* at 1166. In some cases, where an inmate can return to the state grievance system and  
3 exhaust his claim, dismissal without prejudice is appropriate. Here, however, the jail's grievance  
4 system requires the filing of a grievance within 24 hours of the incident (Dkt. 45-1, p. 31). Thus,  
5 plaintiff may not exhaust his claims. Further, plaintiff is no longer an inmate at the Lewis  
6 County Jail and his current address on file with the Court is in Chehalis, Washington. Thus, he  
7 is not an inmate and could not use the grievance system. The Court concludes that the action  
8 should be dismissed with prejudice as plaintiff is unable to exhaust his administrative remedies.

9       2.     Defendant Wilson.

10       Fed. R. Civ. P. 4(m) requires a defendant be served within 120 days after a  
11 commencement of the action. Fed. R. Civ. P. 4(l) requires an affidavit of proof of service be  
12 filed with the court. Although the complaint in this matter was filed on October 29, 2013, the  
13 record does not show that the complaint has been served properly on defendant Wilson. (*see* Dkt.  
14 4). *See also* Fed. R. Civ. P. 4(l) (proving service).

15       Fed. R. Civ. P. 4(m) requires the court to provide notice to plaintiff before the matter may  
16 be dismissed for lack of prosecution. This Report and Recommendation provides plaintiff with  
17 that notice and he has the opportunity to object. The Court recommends dismissal of defendant  
18 Wilson from this action without prejudice.

19       Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
20 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.  
21 6. Failure to file objections will result in a waiver of those objections for purposes of de novo  
22 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit

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1 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on  
2 September 26, 2014, as noted in the caption.

3 Dated this 2nd day of September, 2014.

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6 J. Richard Creatura  
7 United States Magistrate Judge  
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